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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 356

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

THE PILLIOD LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1929
CERTIORARI GRANTED OCTOBER 21, 1929

(34487)

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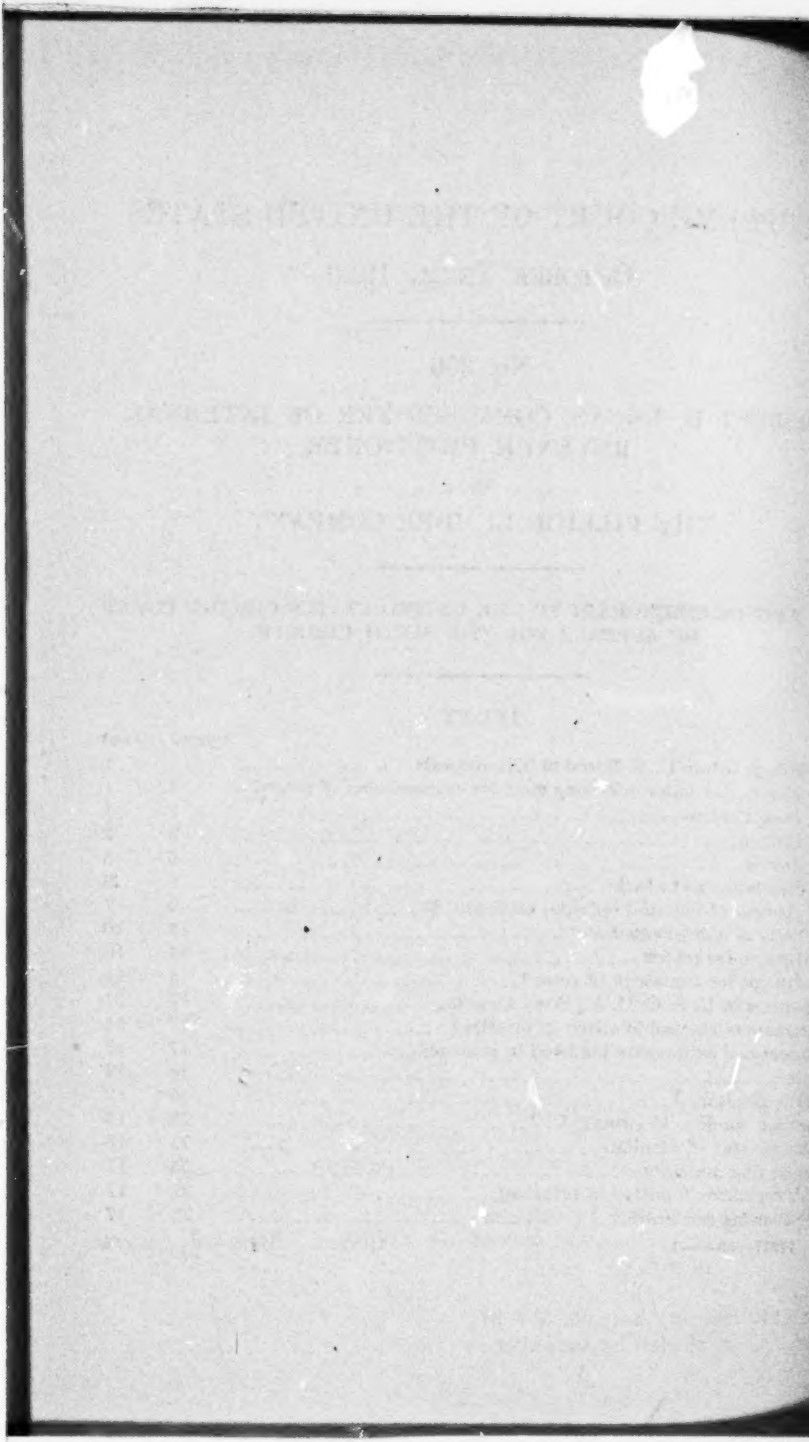

1 Before United States Board of Tax Appeals, Washington

THE PILLIOD LUMBER COMPANY, PETITIONER
vs.
COMMISSIONER OF INTERNAL REVENUE
respondent
} Docket No. 10015

Motion and order enlarging time

Filed November 4, 1927

The Pilliod Lumber Company, the petitioner herein, respectfully shows that on September 7, 1927, it filed its petition for review by the United States Circuit Court of Appeals for the Sixth Circuit of the decision of the board theretofore rendered herein on July 8, 1927; that the time for the transmission and delivery to the clerk of said court of the record for review herein will expire on November 7, 1927, and that unless the time provided by the rules of said court be enlarged by a member of the board or a judge of the court it will be impossible to prepare, transmit, and deliver to the clerk of said court said record for review.

Wherefore, the petitioner moves that the board by a member thereof enlarge the time for transmission and delivery to the clerk of the United States Circuit Court of Appeals for the Sixth Circuit of the record for review by a further period of sixty days.

HERBERT W. NAUTS,
Counsel for Petitioner.

Time for transmission and delivery of record to the clerk of the Circuit Court of Appeals for the Sixth Circuit enlarged and extended to Nov. 26, 1927.

B. H. LITTLETON, *Member.*

[Certificate to foregoing paper omitted in printing.]

2 Before U. S. Board of Tax Appeals

Docket entries

1925
Dec. 16. Petition received and filed.
" 21. Copy of petition served on solicitor.
" 21. Notification of receipt mailed taxpayer.
1926
Jan. 16. Answer filed by solicitor.
" 19. Copy of answer served on taxpayer. Assigned general calendar.
1927
Jan. 14. Hearing date set 3-3-27.
Mar. 1. Brief filed by taxpayer.

Mar. 3. Hearing had before Mr. Korner. Stipulation filed. Submitted on pleadings. Assigned to Mr. Phillips.
" 31. Brief filed by G. C.
May 2. Transcript of hearing 3-3-27 filed.
July 8. Findings of fact & opinion rendered. Judgment will be entered for the comm'r. Both sides notified.
" 9. Order of redetermination signed & filed. Both sides notified.
Sept. 7. Petition for review to U. S. Cir. Ct. of Appeals, 6th Cir., with assignment of errors filed by taxpayer.
Nov. 4. Motion to extend time 60 days filed by taxpayer.
" 4. Designation of record filed by taxpayer.
" 5. Motion of Nov. 4th enlarged to Nov. 26, 27. Both sides notified.
" 12. Hearing set Nov. 22, 1927, on settlement of record.
" 12. Proof of service of hearing notice and præcipe filed.
" 22. Hearing had before Mr. Littleton on settlement of record. Præcipe re contents of record filed by petitioner approved.

[Certificate to foregoing paper omitted in printing.]

3 Before United States Board of Tax Appeals

Petition

Filed December 16, 1925

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, October 23, 1925.

IT:E:SM-60D
ECW

THE PILLIOD LUMBER COMPANY,
Swanton, Ohio.

SIRS: An audit of your income and profits tax return for the year 1918 has resulted in the determination of a deficiency in tax of $963.34 as shown by bureau letter dated April 11, 1922.

In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assesment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D, ECW. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR, *Commissioner.*
By C. R. NASH, *Assistant to the Commissioner.*

Inclosures:
Statements.
Agreement—Form A

4 STATEMENT

IT:E:SM
ECW-60D

In re: Pilliod Lumber Company, Swanton, Ohio—1918

Deficiency in tax $963.34

After a careful review of your protest dated April 27, 1922, from the findings of the Income Tax Unit in respect to your return for the year 1918, as set forth in bureau letter dated April 11, 1922, you are advised that the bureau holds (1) That the amounts set up on the tax-payer's books by its accountants are estimates and in effect nothing more than appreciation; (2) that the facts upon which the appraisal is based have not been substantiated; (3) that the appraisal is not retrospective; and (4) that the assets in question can not be valued for invested capital purposes at a date subsequent to the date acquired.

Accordingly, the conclusions set forth in the above-mentioned letter are sustained.

United States Board of Tax Appeals

Appeal of the Pilliod Lumber Company, Swanton, Ohio

Docket No. —

1

On October 23, 1925, the Commissioner of Internal Revenue determined that there was a deficiency in respect to the income and excess profits taxes of the above-named petitioner for the year 1918, in the amount of $963.34, and on the same day mailed to the petitioner notice thereof. A copy of the commissioner's letter advising

the petitioner of such determination is appended hereto, marked "Exhibit 1."

2

The commissioner's determination is erroneous in the following respects:

I. The assessment of an additional tax for the year 1918 is barred by the statute of limitations.

5 II. The invested capital of the taxpayer was erroneously reduced by the amount of $25,000.00 asserted by the commissioner to represent good will; whereas, in fact, such amount represented tangible property paid in for the company's capital stock and paid in and earned surplus.

2

On or before March 15, 1919, the taxpayer executed and filed in the office of the collector of internal revenue for the 10th district of Ohio, according to the provisions of law and the regulations of the United States Treasury Department in that regard, its tentative income and excess-profits tax return for the calendar year 1918. On May 31, 1919, under the terms and conditions of the general extension granted by the commissioner for that purpose, the taxpayer also filed in the office of the collector its final income and excess-profits tax return for the calendar year 1918 on the official form provided for that purpose, described as "United States Internal Revenue Service Form 1120." Such final return showed and contained all information relating to the taxpayer's gross income, deductions, net income, invested capital, excess-profits credits, and all other information necessary for the computation of its taxes as required by the directions contained in said Form 1120.

The petitioner has at no time consented in writing or otherwise to the determination or assessment of its income and excess-profits taxes for the year 1918 after five years from the time of filing its tentative and final returns for that year, and such returns were not false and fraudulent with intent to evade tax, nor is the deficiency involved in this case or any part thereof attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234 of the revenue act of 1918.

4

The taxpayer's invested capital for the year 1918 was $43,559.26, as reported in its return, and consisted entirely of cash and tangible property paid in for capital stock and surplus and earned surplus, and included no good will or intangible property whatever.

6 5

Proposition of law

The assessment is barred by the provisions of section 277 (2) of the revenue act of 1924.

(Signed) T. J. PILLIOD,
Treasurer of the Pilliod Lumber Company.

[*Duly sworn to by T. J. Pilliod; jurat omitted in printing.*]

Before United States Board of Tax Appeals

Answer

Filed January 16, 1926

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of this taxpayer admits and denies as follows:

7 (1) Admits the material allegations of fact contained in the taxpayer's petition showing jurisdiction of the United States Board of Tax Appeals to determine the correctness of the deficiency of $963.34 determined by the commissioner to be due from this taxpayer.

(2) Denies that the commissioner erred in any manner with respect to the assessment of an additional tax for the year 1918 so far as the statute of limitations is concerned.

(3) Denies that the commissioner erred in reducing the invested capital of this taxpayer by the amount of $25,000, representing alleged good will and appreciation in value of assets.

(4) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

Propositions of law

(1) This taxpayer's invested capital has been properly computed in accordance with the provisions of section 326 of the revenue act of 1916.

(2) The assessment of deficiency with respect to which this taxpayer has appealed is not barred by the provisions of section 277 of the revenue act of 1924.

Wherefore, it is prayed that this taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of counsel:

THOMAS M. WILKINS,
Special Attorney, Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

8 Before U. S. Board of Tax Appeals

Stipulation as to facts

It is hereby stipulated and agreed by and between counsel for petitioner and A. W. Gregg, general counsel, Bureau of Internal Revenue, attorney for the Commissioner of Internal Revenue, that the following facts may be taken as stipulated herein:

1. On or about March 14, 1919, the Pilliod Lumber Company executed and filed with the collector of internal revenue for the tenth district of Ohio a tentative return and estimate of its corporation income and profits taxes for the calendar year ending December 31, 1918, which tentative return is annexed hereto marked "Exhibit 1."

2. On May 31, 1919, the Pilliod Lumber Company filed with the collector of internal revenue of the tenth district of Ohio Form No. 1120, which is annexed hereto and marked "Exhibit 2."

3. On December 8, 1921, an investigation of the tax liability of the Pilliod Lumber Company for the year 1918 was commenced by John T. Gately, an agent of the Internal Revenue Bureau, during the course of which the petitioner's books and records were duly examined by such agent, who completed his investigation on December 13, 1921. The revenue agent made a written report of his investigation to the Commissioner of Internal Revenue, a copy of which report was transmitted to the petitioner and is annexed hereto marked "Exhibit 3."

4. On September 17, 1923, at the request of the Commissioner of Internal Revenue the president and treasurer of the petitioner executed an affidavit which is annexed hereto, marked "Exhibit 4."

5. The amount of nine hundred sixty-three and 34/100 dollars ($963.34) shown due as additional tax by the revenue agent's report, above referred to, is the deficiency involved in this appeal.

6. Petitioner concedes the issue with respect to the determination of its invested capital for the year 1918.

HERBERT W. NAUTS,
Counsel for Petitioner.
A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

9 Before United States Board of Tax Appeals

THE PILLIOD LUMBER CO., PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 10015. Promulgated July 8, 1927

A document filed with the collector of internal revenue on May 31, 1919, in the caption of which appeared in typewriting "The

Pilliod Lumber Co., Swanton, Ohio," but neither signed nor sworn to by anyone, is not such a return as is required by section 239 of the revenue act of 1918, and the filing of such document did not start from that date the running of the statute of limitation of five years.

Herbert W. Nauts, Esq., for the petitioner; Arthur H. Murray, Esq., for the respondent.

Findings of fact and opinion

The commissioner determined a deficiency of $983.34 in respect of the income and profits tax of the petitioner for the calendar year 1918. Petitioner assigns as error that "the assessment of an additional tax for the year 1918 is barred by the statute of limitation," and in its statement of facts in its petition states that it had not at anytime consented in writing, or otherwise, to the determination and assessment of a tax for the year 1918 after five years from the date on which it claims to have filed a return. Petitioner also assigns as error that the commisisoner had failed to include an item of $25,000 in invested capital for the year 1918, but this error was withdrawn at the hearing. The facts are found as stipulated.

Findings of fact

On or about March 14, 1919, the Pilliod Lumber Company executed and filed with the collector of internal revenue for the Tenth District of Ohio a tentative return and estimate of its corporation income and profits taxes for the calendar year ending December 31, 1918.

Said tentative return signed and sworn to by L. N. Pilliod, president, and T. J. Pilliod, treasurer, on March 14, 1919, was entitled "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return" and contains the following:

10 *Collector of Internal Revenue, Toledo, Ohio.*

The amount stated below is remitted herewith in payment of not less than one-fourth of the estimated amount of the income, war-profits, and excess-profits taxes for the year ended December 31, 1918, of the corporation whose name and address appear at the head of this form.

An extension of 45 days in the time allowed for filing a completed return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

Unable to execute and file a complete return.

Estimated amount of tax, $4,000; amount of remittance herewith, $1,000.

On May 31, 1919, the Pilliod Lumber Company filed with the collector of internal revenue of the Tenth District of Ohio Form No. 1120.

The Form 1120 was a document on which was printed "Corporation income and profits tax return for calendar year 1918," and beneath this title there appeared in typewriting the following: The Pilliod Lumber Co., Swanton, Ohio.

This document contained various statements and figures purporting to show gross income, deductions and credits, and net income and invested capital; it also contained various itemized schedules and a statement purporting to show assets and liabilities as of December 31, 1918. This document was neither signed nor sworn to by anyone.

On December 8, 1921, an investigation of the tax liability of the Pilliod Lumber Company for the year 1918 was commenced by John T. Gately, an agent of the Internal Revenue Bureau, during the course of which the petitioner's books and records were duly examined by such agent, who completed his investigation on December 13, 1921. The revenue agent made a written report of his investigation to the Commissioner of Internal Revenue, a copy of which report was transmitted to the petitioner. This report is an audit of the books and records of the petitioner by the revenue agent for the years 1917, 1918, and 1919.

11 On September 17, 1923, at the request of the Commissioner of Internal Revenue, the president and treasurer of the petitioner executed an affidavit which is as follows:

We, the undersigned, hereby affirm that our names should have appeared on our income tax return for 1918, and which to the best of our knowledge and belief is correct. We are unable to furnish duplicate signed report, being unable to locate copy, believing same to have been destroyed with other records.

L. N. PILLIOD, *President.*
T. J. PILLIOD, *Treasurer.*

Sworn to and subscribed before me this 17th day of Sept., 1923.

O. M. BRASLEY,
Notary Public.

On October 23, 1925, the commissioner mailed to petitioner notice of his determination of a deficiency in respect to the income and excess profits tax of petitioner for the year 1918 in the amount of $963.34.

Opinion

LITTLETON: Section 239 of the revenue act of 1918 provides—

"That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer."

The paper filed by the petitioner on March 14, 1919, in the nature of a request for an extension of time for filing a complete return and termed a "tentative return" was certainly not such a return as the statute required. Dallas Brass & Copper Co., 3 B. T. A. 856; Boston Hide & Leather Co., 5 B. T. A. 617; Matteawan Mfg. Co., 4 B. T. A. 953.

Was the document designated form 1120 filed by petitioner on May 31, 1919, the return required by the statute?

The document in question was neither signed nor sworn to by any one. There is no provision of law authorizing the commissioner to waive either the oath or the signatures required by the statute. That the commissioner considers the document filed with the collector on May 31, 1919, at the top of the first page of which was typewritten the name of the petitioner, as not being the return required by the statute is evidenced by the fact that he called the attention of the company to the matter, and a request was made for a sworn statement of the officers touching the subject.

The signatures and oath of the proper parties to a corporate return are not mere empty forms. The purpose is to fix responsibility. Bell Lumber Co., 2 B. T. A. 564; Gutterman Strauss Co., 2 B. T. A. 433. Congress evidently intended when requiring that returns be signed and sworn to that such signatures and oath should have an important bearing upon the determination of the rights of the taxpayer and the Government.

The affidavit made at the request of the commissioner on September 17, 1923, is a sworn acknowledgement of the return as required by law.

Under the circumstances, as shown by the evidence in this case, the board is of the opinion that the Form 1120, filed May 31, 1919, now claimed as a proper income-tax return for the year 1918, was not at that time such a return as the revenue act of 1918 required should be made and filed. Updike v. United States, 8 Fed. (2d) 913.

The petitioner cites and relies on the case of Emmich v. United States, 298 Fed. 5, as sustaining the proposition that a return may be such within the meaning of the statute, although not sworn to.

From a careful reading of that case it will be seen that the defendant was convicted under a count in the indictment charging him with "knowingly, willfully, and feloniously attempting to defeat and evade the tax imposed by the revenue act of 1921" by knowingly, willfully, and feloniously making a return of income far less than the amount of which he was actually the recipient. The gist of the offense was defendant's attempt to evade and defeat the tax imposed, to deceive and defraud the Government by making false and deceptive statements in the return or paper he filed as such. Such attempt or purpose on his part might be effective if the paper was accepted by the collector as true, whether sworn to or not. There was no question but that Emmich signed the return, and there was evidence that it was sworn to.

It is stated in the opinion of the court that " in the first place
13 there is some testimony in the record which would indicate, if believed, that the return was sworn to, and, as has already been explained, it is the province of the jury to determine what weight should be given to the evidence."

The board is of the opinion in this case that the statute of limitation did not begin to run more than five years before October 23, 1925, and hence would not now operate as a bar to the proposed tax assessment.

The board, therefore, determines that there is a deficiency of $963.34 in respect of the tax of this petitioner for the calendar year 1918.

Judgment will be entered for the respondent.

[Certificate to foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Order of redetermination

Pursuant to the board's findings of fact and opinion, promulgated July 8, 1927, it is ordered and decided that, upon redetermination, there is a deficiency for the year 1918 in the amount of $963.34.

(Signed) B. H. LITTLETON,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., July 9, 1927.

[Certificate to foregoing paper omitted in printing.]

14 Before U. S. Board of Tax Appeals

Petition for review

Filed Sept. 7, 1927

The Pilliod Lumber Company, the petitioner herein, respectfully shows that—

It is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Ohio with its principal office and place of business at Swanton, Lucas County, Ohio, and that on or about May 31, 1919, it made to the United States collector of internal revenue for the Tenth District of Ohio at his office in Toledo, Ohio, its corporation, income, and excess-profits tax return for the annual period ending December 31, 1918.

On July 8, 1927, the United States Board of Tax Appeals, upon the petitioner's petition for a redetermination of its corporation income taxes for the year 1918 theretofore determined by the Commissioner of Internal Revenue, rendered a decision in favor of the respondent and against the petitioner, in which decision and the

proceedings had prior thereto certain errors were committed to the prejudice of the petitioner, which are assigned as follows:

I. The board erred in finding that the document described in its finding as "Form No. 1120 filed by the Pilliod Lumber Company in the office of the collector of internal revenue in Toledo, Ohio, on May 31, 1919," was not a corporation income and profits-tax return for the annual period ending December 31, 1918, such as commenced the running of the five-year period, after which the assessment and collection of the tax was barred by the statute of limitations, contrary to the evidence and the law.

II. The board erred in holding that the assessment and collection of an additional amount of corporation income and excess-profits tax from the Pilliod Lumber Company for the annual period ending December 31, 1918, was not barred by the period of limitation provided by law.

III. The board erred in rendering its decision and entering judgment in favor of the respondent and in not rendering its decision and entering judgment in favor of the petitioner.

Wherefore the petitioner prays the board to direct its clerks duly to prepare and send to the United States Circuit Court of Appeals for the Sixth Circuit a transcript of the record and pro-
15 ceedings had in said proceeding, and that the decision and determination of the board be reversed, and for all other and proper relief.

(Signed) HERBERT W. NAUTS,
Counsel for Petitioner.

[*Duly sworn to by T. J. Pilliod; jurat omitted in printing.*]
[Certificate to foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Præcipe for transcript of record

Filed November 4, 1927

To the clerk:

Please transmit and deliver to the clerk of the United States Circuit Court of Appeals for the Sixth Circuit, Federal Building, Cincinnati, Ohio, pursuant to the rules of said court, copies, duly certified as correct, of the following documents in the above-entitled proceeding:

1. The docket entries of proceedings before the board.
2. Pleadings before the board.
16 3. Findings of fact, opinion, and decision of the board.
4. Petition for review.

HERBERT W. NAUTS,
Counsel for Petitioner.

[Certificate to foregoing paper omitted in printing.]
17 [Appearance of counsel omitted in printing.]
[Minute entry of argument and submission Dec. 6, 1928, ...itted in printing.]

18 In United States Circuit Court of Appeals, Sixth Circuit

Decree

Filed June 3, 1929

This cause came on to be heard on a petition to review an order made the 9th day of July, A. D. 1927, in the matter of Pilliod Lumber Company, by the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the said order of the said United States Board of Tax Appeals be, and the same is hereby, reversed and remanded for proper action in accordance with the opinion of this court.

19 [File indorsement omitted.]

No. 5067

In United States Circuit Court of Appeals, Sixth Circuit

THE PILLIOD LUMBER COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition to review an order of the United States Board of Tax Appeals

Opinion filed

June 3, 1929

Before DENISON, MACK, and MOORMAN, Circuit Judges

DENISON, Circuit Judge: This is an appeal from the Board of Tax Appeals under sec. 1224, Tit. 26, U. S. Code. From the findings of fact by the board and the original document, the nature of which is in controversy and which was used by both parties upon the argument upon the theory that it is a part of the record, it appears that the Pilliod Company, an Ohio corporation, undertook to make return and pay its excess-profits, war-profits, and income tax for the year 1918. To this end, in March, 1919, it filed a tentative return, which seems to have been complete in form and which was accompanied by a payment of part of the tax and a request for an extension of time for filing the final return. Within the extended time, and on May 31, it presented to the collector of internal revenue in its district, and he received and filed, the document now in ques-

tion. This consisted of six large pages, constituting Form No. 1120, as furnished by the Internal Revenue Department to corporations for making their income and profits tax returns. Its caption was filled out with the name of the corporation, and all the various schedules, seven in number, which were appropriate, were filled out to show in the customary detail both the war-profits and ex-
20 cess-profits tax and the income tax. It also contained on attached sheets the detailed figures for five of the additional schedules called for by the form. The computations there found indicated a total tax for the year of $3,626.46, and the document was accompanied with the corporation's remittance for $813.23, which, with the previous tentative payment, equalled the amount shown due for the first two quarterly payments. It is to be assumed that the remaining half of the tax, as shown by this return, was duly paid, as nothing appears about it.

In December, 1921, the corporation's books and records for the year 1918 were examined by the agent of the Internal Revenue Bureau—an examination doubtless based upon this document, because his report was filed with the commissioner December 13, 1921, and this "return" bears on its face a notation to that effect. The record further contains a letter from the commissioner, the date of which is not given but which is in reply to the corporation's protest of April 27, 1922, against the findings of the bureau as to the tax for 1918, which findings had been set forth in a letter from the bureau to the corporation on April 11, 1922, and which letter shows that the bureau was insisting upon an additional tax payment for the same reason as later, viz, that the statement of invested capital which had been made by the corporation in this now questioned document was erroneous. The next thing which appears is that shortly before September 17, 1923, the bureau had called the attention of the corporation to the fact, which now appears from inspection of the document, that the blanks at the bottom of the last page, intended for the oath of the president and treasurer, had been left entirely unfilled, and on September 17, in due compliance with the request of the commissioner, the corporation filed what was intended to be and was accepted as the oath of the president and treasurer in due verification of the document so filed in May, 1919. Nothing further was done until October 23, 1925, when the Commissioner made an assessment of a tax deficiency of $963 "as shown by bureau letter dated April 11, 1922." From this deficiency assessment the corporation appealed to the Board of Tax Appeals, and the only question involved is whether the assessment was made within that period of five years after filing the return, to which period the right to assess is limited. (Secs. 277 (a) (2), 278 (a) rev. act of 1924; sec. 250, rev. act of 1918.)

It is to be noted that the law providing for this return (sec. 239, rev. act of 1918) contains no requirement that it should be
21 signed, and the blanks adopted by and used by the Revenue Bureau contemplate no signature as distinguished from the

oath. The law does not require even that there be any signature to the oath, but only that the return be "sworn to."

With reference to this same statute, we held in Emmich v. U. S., 298 Fed. 5, that even though such a document were not in fact sworn to, nevertheless it was a "return" within the scope of the statute punishing false returns; and it is urged with some force that a paper which is a good enough return to justify a conviction of felony because it is a false return is a good enough return to start the statute of limitations running. However, it may be said that a person offering such a paper as a return may not dispute that it is such, while the Government may refuse to accept it as having that character; and we prefer to dispose of this case without dependence upon the Emmich case.

The statutory requirement that the return should be verified is, of course, made to be observed and is of importance; it does not follow that the document, without the oath, is necessarily for all purposes a complete nullity. It would be the duty of the collector to whom such a paper was tendered to refuse to receive it, and the omission would probably be at once corrected. Indeed, it is customary in many places for the taxpayer to take these returns in, present them to the collector, and swear to them before him at the time of the presentation. The purpose of this return is to put before the bureau, in detail, all the facts and figures leading to the computation of the proper tax; and where it appears, as here, that the paper was complete in all details except for the lack of the oath; that it was tendered to the collector and received and filed by him as the statutory return; that it was made the basis of an examination some two and a half years later by the bureau; that it was used by the bureau as the basis of computations and corrections in April, 1922, three years after its filing; and that seemingly no one ever noticed until four and a half years after its filing that no oath was endorsed upon it—under all these circumstances, we think it must be treated by the Government as such a "return," as of its filing date, that the time for making assessment against the taxpayer then began to run.

Our attention is not drawn to any decision directly in point, and we find none. "Return" is a word of general meaning. With reference to a sheriff's return or a return to an appeal, it is common to find returns which are not good under the law but which nevertheless may be amended, as could not be done if they were
22 nullities. This is not a prosecution for perjury, but calls only for a reasonable application of the statute of limitations, one purpose of which is the protection of the taxpayer against claims asserted too long a time after the occurrences upon which they are based. We think a reasonably liberal construction of the word is appropriate to this situation.

Further considerations may be noted: The antithesis of "after the return was filed" of sec. 277 is the "failure to file a return" of sec. 278, which permits assessment "at any time." Where there has

been, as here, such a filing of return that no one for some years discovers any defect, but the bureau and the taxpayer both act as if upon a due return, a congressional intent that a deficiency may be levied ten or twenty years later seems improbable.

Again sec. 239 of the revenue act of 1918 requires three things in the return—gross income, deductions, oath. Each is as essential as the other; yet the omission of items of income or deductions would justify asking an amended return, not ignoring it as nonexistent.

Though the matter is not as clear as we would wish, we think the conclusion of the Board of Tax Appeals must be reversed, and the matter remanded to that board for appropriate action.

23 In United States Circuit Court of Appeals

Dissenting opinion

MOORMAN, C. J. (dissenting): I can not concur. The statute says that a corporation shall make a return stating specifically the items of its gross income and the deductions and credits allowed, and that the return shall be sworn to by the president or other principal officer and by the treasurer or assistant treasurer. Until there has been a substantial compliance by the corporation with these requirements of the statute, there is no return—and hence limitation can not begin to run. The report which appellant filed purported to show income, with deductions and credits, but was not sworn to. The statute just as specifically requires the doing of the latter as the former. If its purpose is to require the corporation to put before the bureau, as accurately and truly as possible, the facts and figures necessary to a correct computation of the proper tax, then it would seem that the verifications under oath are quite as important as the other requirements. Indeed, nothing could be quite so effective of that purpose as the putting of the obligations and hazards of an oath upon the conscience of those whose duty it is to make the report. Congress thought it important enough to require two officers of the corporation to swear to the report.

It was not shown in this case whether the report was mailed to the collector or was handed to him or one of his assistants. If it had been tendered to the collector and he had refused to receive it because it was not sworn to, I should not suppose that any one would contend that it was a return. On the other hand, a report tendered in the prescribed form would have been sufficient, I should think, even if rejected by the collector. The question then turns, as it would seem from the opinion of the court, upon the action of the collector. He, or some one in his office who attended to such matters, filed the report, mistakingly thinking, I have no doubt, that it was properly verified, as I assume the corporation did, too. The statute, as I have said, could only be set in motion by the doing of certain things by the corporation. It failed to do those things;

but it now contends, and the majority opinion in effect holds, that notwithstanding its failure the statute nevertheless became effective because the collector, thinking that the corporation had performed its duty, failed to observe its mistake. I do not think this is sound. It would not be thought to be, I am sure, in the case of a document purporting to be a return which did not pretend to show gross income, with allowable deductions and credits. Having in
24 mind the purpose of such returns, as indicated, I fail to see why there should be any distinction between that case and this.

The State cases that were cited in argument hold that in the absence of compliance with a statute which requires a return to be verified under oath, there is no return. Lawrence v. Janesville, 46 Wis. 364; Newell v. Whitingham, 58 Vt. 341; Narragansett v. Assessors, 17 R. I. 452; and Lee v. Commonwealth, 6 Dana (Ky.) 312. The question was not ruled differently in Emmich v. United States (6 C. C. A.), 298 Fed. 5. In that case the defendant was charged with "knowingly, wilfully, and feloniously attempting to defeat and evade" a tax. The return was set forth merely as the means of the attempt. The point was made that it was not a return, because it was not sworn to. The court held that there was evidence to show that it was sworn to. That holding was entirely sufficient for the purposes of the case. What was further said about the return was in connection with its admissibility in evidence. It should have been admitted because, as appears from the record of that case in this court, it showed on its face that it was sworn to. That of itself was sufficient for its admission.

25 In United States Circuit Court of Appeals

Motion to stay mandate

Filed Jun. 24, 1929

Now comes the Commissioner of Internal Revenue, the petitioner herein, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and moves the court to enter an order herein staying its mandate for a period of three months from the date of the entry of the judgment herein.

In support of this motion the said Commissioner of Internal Revenue respectfully shows to the court that he is considering the advisability of filing in the Supreme Court within the three months' period provided by statute in that respect a petition for certiorari in this cause; that it is highly probable that such petition for certiorari will be filed; and that he believes it undesirable under such circumstances to have the mandate of this court issue in accordance with the general rules of this court.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

In United States Circuit Court of Appeals

Order staying mandate

Filed Jul. 1, 1929

Order, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date, provided that, if within such thirty days the applicant shall file with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed and that
26 proof by affidavit of notice thereof under paragraph 3 of Rule 38 of the Supreme Court has been given, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for the mandate shall issue.

27 [Clerk's certificate to foregoing transcript omitted in printing.]

28 Supreme Court of the United States

Order allowing certiorari

Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:]
File No. 34487. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 356. Commissioner of Internal Revenue, petitioner, vs. The Pilliod Lumber Company. Petition for writ of certiorari and exhibit thereto. Filed August 29th, 1929. File No. 34487.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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FILE COPY

No.—356

In the Supreme Court of the United States

OCTOBER TERM, 1929

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE PILLIOD LUMBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE PILLIOD LUMBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above cause on June 3, 1929, reversing the decision of the United States Board of Tax Appeals.

STATEMENT

The facts as found by the Board of Tax Appeals, (R. 9–11), are as follows:

On or about March 14, 1919, the respondent, Pilliod Lumber Company, executed and filed with the

Collector of Internal Revenue a tentative return and estimate of its corporate income and profits taxes for the calendar year 1918. This return was signed and sworn to by the president and treasurer of the respondent corporation and showed an estimated tax for the year 1918 in the amount of $4,000.

On May 31, 1919, the respondent filed with the Collector of Internal Revenue Form 1120, the return form for 1918, setting forth its gross income, deductions and credits, and the other information required by law. This document was neither signed nor sworn to by anyone. The name and address of the corporation appeared in typewriting in the caption.

In December, 1921, an investigation of the respondent's tax liability for the year 1918 was made by an agent of the Internal Revenue Bureau, and on September 17, 1923, the president and treasurer of the respondent corporation executed an affidavit in which they affirmed that their names should have appeared on the return filed May 31, 1919, and that the return to the best of their knowledge and belief was correct.

On October 23, 1925, the Commissioner mailed to the respondent a written notice of his determination of a deficiency in respect to the income and excess-profits taxes for the year 1918 in the amount of $963.34.

From this determination the respondent appealed to the United States Board of Tax Appeals on the

ground that the additional assessment was barred by the statute of limitations. The Board held that the unsworn return filed on May 31, 1919, was not the return required by law and did not set the statute of limitations in motion. It accordingly entered judgment for the Commissioner. (R. 11–13.)

On appeal by the respondent the Circuit Court of Appeals reversed the Board. (R. 17.) A majority of the judges held that while the statute requiring returns to be verified is to be observed and is of importance, an unsworn return is not necessarily a nullity and that, (R. 19), "It would be the duty of the collector to whom such a paper was tendered to refuse to receive it, and the omission would probably be at once corrected."

Circuit Judge Moorman dissented. (R. 20.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that an unsigned and unsworn tax return is such a return within the meaning of Section 239 of the Revenue Act of 1918 as to set in motion the five-year period of limitation provided by Section 277 (a) (2) of the Revenue Act of 1924 for the assessment and collection of taxes.

(2) In holding that the failure of the Collector of Internal Revenue to call attention to the defect in the return in effect barred the Government from raising objection that the document filed was not in a form to set the statute of limitations in motion.

REASONS FOR GRANTING THE WRIT

(1) The question here involved is of importance and is one of constant recurrence. A decision by this Court is desirable in order that the question may be definitely settled.

(2) The decision of the Circuit Court of Appeals is contrary in principle to the decisions of this Court in *Rock Island, etc., R. R.* v. *United States,* 254 U. S. 141, and *Girard Trust Co.* v. *United States,* 270 U. S. 163, which hold that even formal requirements of taxing statutes must be complied with. The requirement of an oath to a tax return is more than a formal requirement. The information necessary for the Commissioner to assess income taxes is peculiarly within the knowledge of the taxpayer. The only practicable way to make reasonably sure of the accuracy of that information is to require, as has been done, that it be furnished by the taxpayer under the sanctity of an oath. In *Beam* v. *Hamilton,* (C. C. A., 6th), 289 Fed. 9, it was held that a failure to comply with the strict requirements of the statute relating to returns was a failure to make the return contemplated by the statute.

(3) The holding of the Circuit Court of Appeals that the Government is barred from raising objection to the form of the document by reason of the failure of the Collector of Internal Revenue to detect the defect in taxpayer's return at the time it was filed is contrary to the well-established rule that the Government is never liable for the negligence or laches of its agents. *United States* v. *Kirk-*

patrick, 9 Wheat. 720; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123, 125.

(4) The decision of the Circuit Court of Appeals is in conflict with the decisions of such State courts as have had occasion to pass upon the question. *Newell* v. *Whitingham,* 58 Vt. 341; *Lawrence* v. *City of Janesville,* 46 Wis. 364; *Lee* v. *The Commonwealth,* 36 Ky. 311; *Narragansett Pier Co.* v. *Assessors,* 17 R. I. 452. Moreover the opinion of the Circuit Court of Appeals in the instant case was by a divided court and the majority opinion admits that the question is not free from doubt.

(5) The question is related in principle to the question involved in the case of *Florsheim Bros. Dry Goods Co.* v. *United States,* 29 F. (2d) 895, where the Circuit Court of Appeals for the Fifth Circuit held that the statute of limitations is not set in motion by the filing of a tentative return. The *Florsheim case* and the case of *White* v. *Hood Rubber Co.,* not yet reported, decided June 25, 1929, in which the Circuit Court of Appeals for the First Circuit reached an opposite conclusion as to the sufficiency of a tentative return, are now pending before this Court on petitions for writs of certiorari.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

CHARLES E. HUGHES, JR.,
Solicitor General.

AUGUST, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 11–13) is reported in 7 B. T. A. 591. The opinion of the Circuit Court of Appeals (R. 17) is not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 3, 1929. (R. 17.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Is the filing of an unsigned and unsworn tax return a sufficient compliance with the provisions of Section 239 of the Revenue Act of 1918 to set in motion the five-year limitation of Section 277 (a) (2) of the Revenue Act of 1924, within which income and excess-profits taxes imposed by the Revenue Act of 1918 must be assessed and collected?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1081, 1083, are as follows:

> SEC. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a re-

turn, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. * * *

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

The pertinent provisions of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 301, are as follows:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Article 407 of Treasury Regulations 45, (1919 ed.), promulgated April 17, 1919, provides:

> Copies of the prescribed return forms will so far as possible be furnished taxpayers by collectors. Failure on the part of any taxpayer to receive a blank form will not, however, excuse him from making a return. Taxpayers not supplied with the proper forms should make application therefor to

> the collector in ample time to have their returns prepared, verified and filed with the collector on or before the last due date. Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute. In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form. * * *

The regulations since then have remained unchanged. See Regulations 45, (1920 ed.), Revenue Act of 1918; Regulations 62, (1922 ed.), Revenue Act of 1921; Regulations 65, Revenue Act of 1924; Regulations 69, Revenue Act of 1926.

ARGUMENT

It is provided by Section 277 (a) (2) of the Revenue Act of 1924 that taxes imposed by the Revenue Act of 1918 "shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period." The return to which this section has reference is the one defined in Section 239 of the Revenue Act of 1918. That section requires (1) that the return shall state spe-

cifically the items of gross income and the deductions and credits allowed, and (2) that the return shall be sworn to by two designated officers of the corporation.

The statute thus squarely places upon the taxpayer the burden of fixing the time when the statute of limitations begins to run in his case. That time is when the return defined by Section 239 is filed. Anything short of compliance with all the statutory requirements of that section would fail to make a return the return required by the statute. As was said in *Botany Mills* v. *United States,* 278 U. S. 282, 289, "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." See also *Davis* v. *United States,* 17 C. Cls. 292.

This Court has recognized the necessity of strict compliance with even the formal requirements of taxing statutes. In *Rock Island, etc., R. R.* v. *United States,* 254 U. S. 141, it affirmed the judgment of the Court of Claims in dismissing a petition for the recovery of taxes, on the ground that the taxpayer, while making a claim for an abatement of the tax, failed to make a formal claim for refund as required by Section 3226, Revised Statutes, as amended by the Act of February 27, 1877. As pointed out by Mr. Justice Holmes, who delivered the opinion of the Court, (p. 143), "Men must turn square corners when they deal with the Government."

In respect of its importance and the necessity of strict observance, the requirement of an oath to a return to set in motion the statute of limitations is like the requirement of Section 1324 (a) of the Revenue Act of 1921, that a protest must be specific to entitle a taxpayer to allowance of interest on a refund from date of payment of tax, which this Court had under consideration in *Girard Trust Company* v. *United States*, 270 U. S. 163.

The omission on the part of the taxpayer in the instant case is more serious than the omissions which this Court refused to sanction in the *Rock Island R. R.* and *Girard Trust Company cases, supra.* In requiring a return to be sworn to, the law has a twofold object in view. The first and principal object is to compel some ascertainable person to report the truth, and the second to provide a basis for punishing him if he wilfully falsifies. These objects are of the utmost importance to an efficient and equitable administration of the law. They make necessary fewer investigations on the part of the Government to ascertain the true facts, thereby facilitating the dispatch of public business and lowering its costs. The measure of the income tax is the taxpayer's net income. This information is peculiarly within the knowledge of the taxpayer. The most effective, and, indeed, the only practicable way to secure that information and at the same time to make reasonably sure of its accuracy is to require, as has been done in Section 239, *supra,* that it be furnished under the sanctity of an oath.

To condone failure to swear to a tax return as required by Section 239, *supra,* would be to invite carelessness in the preparation of the return, to make the information contained therein less reliable, and to render it of little or no value to the Treasury Department. Assessment would be more difficult and require a longer time and, in the event of wilful falsity, the taxpayer would escape prosecution for perjury, which is one of the penalties provided by law to insure honesty in returns. In view of these consequences Congress could hardly have intended an unsworn tax return to set the statute of limitations in motion.

The Circuit Court of Appeals in the instant case, while recognizing the importance of the statutory requirement that a return shall be verified, held that the collector should have refused to receive the unsworn form and that, inasmuch as the absence of the verification was not noticed until four and one-half years after filing, the return must be treated as the return required by statute. The effect of this holding is to make the Government liable for the negligence or laches of its officers contrary to the principle of law first established by this Court in *United States* v. *Kirkpatrick,* 9 Wheat. 720, often approved, and recently applied in *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409, and *Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123, 125.

In those cases where State courts have had occasion to pass upon the sufficiency of a return or list

which was not given under oath as required by law, it has been held that a taxpayer could take no benefit from such unsworn return or list. *Newell* v. *Whitingham,* 58 Vt. 341; *Lawrence* v. *City of Janesville,* 46 Wis. 364; *Lee* v. *The Commonwealth,* 36 Ky. 311. See also *Narragansett Pier Co.* v. *Assessors,* 17 R. I. 452, where a taxpayer's petition for relief was dismissed solely for noncompliance with the statute fixing certain requirements with respect to returns; and *Davis* v. *United States,* 17 C. Cls. 292, which held that an exporter was not entitled to the allowance of a drawback for internal taxes paid on exported manufactures because the claim filed with the Commissioner of Internal Revenue failed to include the certificate and affidavit required by the Treasury Regulations.

Article 407 of Treasury Regulations 45, (1919 ed.), *supra,* which was in effect at the time the respondent corporation filed its unsigned and unsworn return, provided that "imperfect or incorrect returns will not be accepted as meeting the requirements of the statute." Under subsequent Acts which reenacted the same requirements of the 1918 Act as to the oath to the return this regulation has remained unchanged. (Regulations 62, 65, and 69, *supra.*)

Finally, it is submitted that Section 277 (a) (2), *supra,* being a statute of limitations barring the Government, should receive a strict construction rather than the liberal interpretation which the Circuit Court of Appeals applied in this case.

United States v. *Whited & Wheless*, 246 U. S. 552, 561; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 314; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462. But see *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 349–350.

It is to be noted that the opinion of the Circuit Court of Appeals is by a divided court. The majority opinion admits that, (R. 20), "the matter is not as clear as we would wish."

CONCLUSION

In view of the importance of the question involved and of the fact that the decision below seems to be in conflict with the principles announced by this Court in the cases which have been cited, it is respectfully submitted that a writ of certiorari should be issued.

CHARLES E. HUGHES, Jr.,
Solicitor General.

SEWALL KEY,
BARHAM R. GARY,
Special Assistants to the Attorney General.

AUGUST, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

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No. 356

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE PILLIOD LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 356

ROBBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

THE PILLIOD LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO ADVANCE

The Solicitor General, on behalf of the Commissioner of Internal Revenue, opposes respondent's motion to advance this case to be heard immediately after the argument in No. 118, *Florsheim Brothers Drygoods Co., Ltd.* v. *United States*, and No. 414, *White* v. *Hood Rubber Co.*

The question of the sufficiency of a tentative return to set the statute of limitations in motion, which is one of the questions involved in cases Nos. 118 and 414, is not presented in the instant case. The record in the instant case shows that two ques-

tions were raised before the Board of Tax Appeals, (1) whether the filing of a tentative return started the running of the statute of limitations, and (2) whether the subsequent filing of an unverified completed return was sufficient for the purpose. The Board held against respondent on both questions. (R. 6–10.) In its petition for review in the Circuit Court of Appeals (R. 11) respondent specifically raised the question as to the sufficiency of the unverified completed return to start the running of the statute of limitations and in addition made two general assignments of error, one to the effect that the Board erred in holding that the statute of limitations had not run, and the other to the effect that the Board had erred in rendering its decision and entering judgment in favor of the Commissioner.

The taxpayer's brief in the Circuit Court of Appeals shows that the only question raised was that of the sufficiency of the unverified completed return to set the statute of limitations in motion, and that point alone was considered by the court. (R. 12–15.)

It is respectfully submitted that respondent's motion to advance in the instant case should be denied.

CHARLES E. HUGHES, JR.,
Solicitor General.

JANUARY, 1930.

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ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE PILLIOD LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 356

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

THE PILLIOD LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 8–10) is reported in 7 B. T. A. 591. The opinion of the Circuit Court of Appeals (R. 12–16) is reported in 33 F. (2d) 245.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 3, 1929. (R. 12.) Petition for writ of certiorari was filed August 29, 1929, and granted October 21, 1929. (R. 17.) The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Is the filing of an unsigned and unsworn tax return sufficient compliance with the provisions of Section 239 of the Revenue Act of 1918 to set in motion the five-year limitation of Section 277 (a) (2) of the Revenue Act of 1924, within which income and excess-profits taxes imposed by the Revenue Act of 1918 must be assessed and collected?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1081, 1083, are as follows:

> SEC. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. * * *
>
> * * * * * *
>
> SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or

was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

The pertinent provisions of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 301, are as follows:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax)

shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Article 407 of Treasury Regulations 45 (1919 ed.), promulgated April 17, 1919, provides:

Copies of the prescribed return forms will so far as possible be furnished taxpayers by collectors. Failure on the part of any taxpayer to receive a blank form will not, however, excuse him from making a return. Taxpayers not supplied with the proper forms should make application therefor to the collector in ample time to have their returns prepared, verified and filed with the collector on or before the last due date. Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute. In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form. * * *

The regulations since then have remained unchanged. See Regulations 45 (1920 ed.), Revenue Act of 1918; Regulations 62 (1922 ed.), Revenue Act of 1921; Regulations 65, Revenue Act of 1924; Regulations 69, Revenue Act of 1926.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 7–8) are as follows:

On or about March 14, 1919, the Pilliod Lumber Company executed and filed with the Collector of Internal Revenue for the Tenth District of Ohio a tentative return and estimate of its corporation income and profits taxes for the calendar year ending December 31, 1918, signed and sworn to by L. N. Pilliod, president, and T. J. Pilliod, treasurer, on March 14, 1919, on a form entitled "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return." It contained the following:

> *Collector of Internal Revenue, Toledo, Ohio:*
>
> The amount stated below is remitted herewith in payment of not less than one-fourth of the estimated amount of the income, war-profits, and excess-profits taxes for the year ended December 31, 1918, of the corporation whose name and address appear at the head of this form.
>
> An extension of 45 days in the time allowed for filing a completed return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

Unable to execute and file a complete return.

Estimated amount of tax, $4,000; amount of remittance herewith, $1,000.

On May 31, 1919, the Pilliod Lumber Company filed with the Collector of Internal Revenue of the Tenth District of Ohio Form 1120.

Form 1120 was a document on which was printed "Corporation income and profits tax return for calendar year 1918," and beneath this title there appeared in typewriting the following: "The Pilliod Lumber Co., Swanton, Ohio."

This document contained various statements and figures purporting to show gross income, deductions and credits, and net income and invested capital; it also contained various itemized schedules and a statement purporting to show assets and liabilities as of December 31, 1918. This document was neither signed nor sworn to by anyone.

On December 8, 1921, an investigation of the tax liability of the Pilliod Lumber Company for the year 1918 was commenced by an agent of the Internal Revenue Bureau. He examined respondent's books and records, completed his investigation on December 13, 1921, and make a written report of the investigation to the Commissioner of Internal Revenue, a copy of which report was transmitted to the respondent. This report con-

sists of an audit of the books and records of the respondent for the years 1917, 1918, and 1919. (R. 8.)

On September 17, 1923, at the request of the Commissioner of Internal Revenue, the president and treasurer of the respondent executed an affidavit which is as follows:

> We, the undersigned, hereby affirm that our names should have appeared on our income tax return for 1918, and which to the best of our knowledge and belief is correct. We are unable to furnish duplicate signed report, being unable to locate copy, believing same to have been destroyed with other records.
>
> L. N. PILLIOD, *President.*
> T. J. PILLIOD, *Treasurer.*
>
> Sworn to and subscribed before me this 17th day of September, 1923.
>
> O. M. BRASLEY,
> *Notary Public.*

On October 23, 1925, the Commissioner mailed to respondent notice of his determination of a deficiency in respect to the income and excess profits tax of respondent for the year 1918 in the amount of $963.34.

From this determination respondent appealed to the United States Board of Tax Appeals on the ground that the assessment was barred by the statute of limitations. The Board held that neither the tentative return filed in March, 1919, nor the unsworn return filed on May 31, 1919, was the re-

turn required by law, and hence that neither set in motion the statute of limitations. It accordingly entered judgment for petitioner. (R. 8–10.)

On the taxpayer's appeal the Circuit Court of Appeals reversed the Board. (R. 12.) A majority of the judges held that while the statute requiring returns to be verified is to be observed and is of importance, an unsworn return is not necessarily a nullity and that (R. 14) "it would be the duty of the collector to whom such a paper was tendered to refuse to receive it, and the omission would probably be at once corrected." One judge dissented. (R. 15–16.)

Although the Board of Tax Appeals held that neither document constituted the return required by statute, the taxpayer in his petition to the Circuit Court of Appeals for review specifically assigned as error the Board's holding that the paper filed on May 31, 1919, was not such a return as set in motion the statute of limitations, but did not assign as error the holding that the "tentative return" was not such a return, unless it may be said to be included in the very general assignments numbered II and III. (R. 11.) The Circuit Court of Appeals decided the case on the ground that the paper filed May 31, 1919, coupled with the Collector's failure to affirmatively reject it, constituted the filing of the return required by law, and made no mention of the "tentative return" except to state the fact.

It would appear that the taxpayer has abandoned the contention that the "tentative return" set in motion the statute of limitations; but if the Court should consider that point, the petitioner's argument will be found in its brief in *Florsheim & Co.* v. *United States,* No. 118, and *White* v. *Hood Rubber Co.,* No. 414, argued this day.

SUMMARY OF ARGUMENT

Section 277 (a) (2) of the Revenue Act of 1924, in providing that the statute of limitations for the assessment and collection of taxes imposed by the Revenue Act of 1918 shall begin to run from the filing of the taxpayer's income tax return, clearly contemplates the return required by law. That return is defined in Section 239 of the Revenue Act of 1918 which requires (1) that the return shall state specifically the items of gross income and the deductions and credits allowed, and (2) that the return shall be sworn to by two designated officers of the corporation. The document in the instant case, being neither signed nor sworn to by anyone, plainly fails to meet the second of these requirements. Accordingly, it is not the return required by the statute and is insufficient to set the statute of limitations in motion.

While strict compliance with even the formal requirements of taxing statutes is necessary, the provision that a return shall be under oath is more than a mere formality. It is of great practical importance and is necessary to the proper admin-

istration of the tax laws. The affidavit made by respondent in September, 1923, did not operate to start the period of limitation running as of the date of the filing of the unsworn return, May 31, 1919.

The effect of the holding of the Circuit Court of Appeals below, which places a duty upon the Collector to refuse to accept an unverified return, is to make the Government liable for the negligence and laches of its officers, contrary to the well-settled rule of law.

ARGUMENT

AN UNSIGNED AND UNSWORN TAX RETURN IS NOT THE RETURN REQUIRED BY LAW AND THE FILING OF SUCH A RETURN DOES NOT SET IN MOTION THE STATUTE OF LIMITATIONS

It is provided by Section 277 (a) (2) of the Revenue Act of 1924 that taxes imposed by the Revenue Act of 1918 " shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period." The return to which this section has reference is the one defined in Section 239 of the Revenue Act of 1918. That section requires (1) that the return shall state specifically the items of gross income and the deductions and credits allowed, and (2) that the return shall be sworn to by two designated officers of the corporation.

The statute thus squarely places upon the taxpayer the burden of fixing the time when the statute

of limitations begins to run. That time is when the return defined by Section 239 is filed. Anything short of substantial compliance with all the requirements of that section will not constitute the return required by the statue. As was said in *Botany Mills* v. *United States*, 278 U. S. 282, 289, "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." See also *Davis* v. *United States*, 17 C. Cls. 292.

This Court has recognized the necessity of strict compliance with even the formal requirements of taxing statutes. In *Rock Island, etc., R. R.* v. *United States*, 254 U. S. 141, it affirmed the judgment of the Court of Claims in dismissing a petition for the recovery of taxes on the ground that the taxpayer failed to make a formal claim for refund as required by Section 3226, Revised Statutes, as amended by the Act of February 27, 1877. As pointed out by the Court (p. 143), "Men must turn square corners when they deal with the Government."

In respect of its importance and the necessity of strict observance, the requirement of an oath to a return to set in motion the statute of limitations is like the requirement of Section 1324 (a) of the Revenue Act of 1921 that a protest must be specific to entitle a taxpayer to allowance of interest on a refund from date of payment of the tax, which this Court had under consideration in *Girard Trust Co.*

v. *United States*, 270 U. S. 163. There it was said (p. 172):

> The Government's contention is that the distinction made in Section 1324, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after the date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.
>
> We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once. But if protests are based on reasons of no validity, they do not accomplish the public purpose for which they are devised.

The omission on the part of the taxpayer in the instant case is more serious than the omissions which this Court refused to sanction in the *Rock Island Case* and the *Girard Trust Co. case, supra.* In requiring a return to be sworn to, the law has a twofold object in view. The first and principal object is to compel some ascertainable person to

report the truth; the second, to provide a basis for punishing him if he wilfully falsifies. These objects are of the utmost importance to an efficient and equitable administration of the law. They tend to reduce the number of investigations to ascertain the true facts, thereby facilitating the dispatch of public business and lowering its cost. The measure of the income tax is the taxpayer's net income. This information is peculiarly within the knowledge of the taxpayer. The most effective and, indeed, the only practicable way to secure that information and at the same time to make reasonably sure of its accuracy is to require, as has been done in Section 239, *supra,* that it be furnished under the sanctity of an oath.

To condone failure to swear to a tax return as required by Section 239, *supra,* would be to invite carelessness in the preparation of the return and to make its contents less reliable and less valuable to the Treasury Department. Assessment would be more difficult and require a longer time. In the event of wilful falsity, the taxpayer would escape prosecution for perjury, which is one of the penalties provided by law to insure honesty in returns. Cf. *United States* v. *Noveck,* 273 U. S. 202. In view of these consequences Congress could hardly have intended an unsworn tax return to set the statute of limitations in motion.

In *Davis* v. *United States, supra,* it was held that an exporter was not entitled to the allowance of a drawback for internal taxes paid on exported man-

ufactures, because the claim filed with the Commissioner of Internal Revenue failed to include the certificate and affidavit required by the Treasury regulations.

In those cases where State courts have had occasion to pass upon the sufficiency of a return or list which was not given under oath as required by law, it has been held that a taxpayer could take no benefit from such unsworn return or list. *Newell* v. *Whitingham,* 58 Vt. 341; *Lawrence* v. *City of Janesville,* 46 Wis. 364; *Lee* v. *The Commonwealth,* 36 Ky. 311.

In the *Newell case, supra,* where a taxpayer, instead of attaching to his inventory the oath in the precise form given in the statute, added the words "to my best knowledge and belief," it was held that the listers were entitled to double the value of the taxpayer's property as ascertained by themselves, as in the case of wilful omission to make and swear to a legal inventory. The court said (p. 345):

> Where the legislative enactment is plain and certain in terms, and nothing in substance is to be gained by a deviation, and substantial convenience and advantage, without injustice, is subserved by literal compliance, we think such compliance was intended.

In the *Lawrence case, supra,* it was held that an assessor is not bound by an unsworn list and might assess the value of the taxpayer's property by other means.

In the *Lee case, supra,* the Supreme Court of Kentucky said (p. 311):

> Though the statute authorized the assessment of a fine and treble tax only for *failing to give in a proper list,* yet as the law required Lee, as the owner of taxable property, to give in his list on oath, his refusal to verify, by the requisite affidavit, the list offered by himself was a refusal to *give in a list as required by law;* and was as much so, in judgment of law, as would have been a refusal altogether to give any list whatever.

See also *Narragansett Pier Co.* v. *Assessors,* 17 R. I. 452, where a taxpayer's petition for relief was dismissed solely for noncompliance with the statute fixing certain requirements with respect to returns.

The question involved in the case at bar has not heretofore been before the courts, but it is believed that the correct principle for its solution is to be found in the decisions just discussed and particularly in *United States* v. *Updike* (D. C. Neb.), 1 F. (2d) 550, and *Beam* v. *Hamilton* (C. C. A. 6th), 289 Fed. 9, in both of which cases closely analogous situations were presented.

In the *Updike case, supra,* it is said (p. 555):

> The salient feature of the statute of limitations incorporated in this section 250 (d) is that it can be set in motion and started to run only by the affirmative, honest act of the taxpayer, and not otherwise. * * * If the taxpayer fails or refuses to make such a

return as the law contemplates, or willfully makes a false and fraudulent one, proceedings will lie against him to recover the tax at any time.

After dissolution of this corporation, its former secretary sent back to the collector of revenue the blank form provided for making the return for the tax under the law of October 3, 1917, and declared that the corporation was not in existence, and had no officers, directors, or stockholders, and that there was no money or property of the corporation in existence, and said that he was advised that the regulation, meaning the one requiring return for the tax of October 3, 1917, was erroneous. It is contended that the corporation should be deemed to have made return and to have taken sufficient affirmative action to start the statute in its favor because its returns under the 1916 act and the Act of March 3, 1917, being honestly made and filed in July and September, 1917, fairly disclosed its gains and profits for the period covered by the Act of October 3, 1917. The argument is that the corporation, having in this way honestly given the Commissioner the basis to compute the tax under the October 3, 1917, law, and then, having frankly and full disclosed all the facts as to the dissolution and distribution of the assets, and having made clear its claim of no liability, the government's right to the tax, if any it ever had, should be deemed barred; if not in five years after August, 1917, when the returns were made and filed by the cor-

poration, at least five years after the Commissioner was directly and fully informed of all the facts. Full information having been brought to the tax officials, it is claimed the statute started to run.

* * * * *

Under each income tax law there are regulations promulgated to carry out that law, and then blank forms of return are prepared to meet the requirements of each particular law. These blank forms are submitted to the taxpayer, to be filled out and verified by him, and *when he has filled out the blank, added the verification, and delivered the document to the proper officer, then the taxpayer is said to have made and filed return under the designated law.* And the plain meaning of Congress in section 250 (d) is that such a making and filing of return under any one of the revenue acts will start the statute in favor of the taxpayer and against the government. There is nothing in the statute to imply that anything other than such making of return under the particular act would set the statute in motion. (Italics ours.)

The above decision of the District Court was affirmed by the Circuit Court of Appeals for the Eighth Circuit (8 F. (2d) 913) and petition for certiorari was denied (271 U. S. 661).

The *Beam case, supra,* involved the same principle in a different connection. There, in dealing with the requirements of the excess-profits tax provisions of the Act of October 3, 1917, and the regulations made thereunder which required a separate

return of the income from a trade or business with invested capital and the failure of the taxpayer to make such return, although he had made an income-tax return, the court said (p. 14):

> Not only was the excess-profits tax a separate, distinct, and then novel source of revenue, but the statute and regulations, as we have above shown, in express and formal terms required separate and distinct returns thereof, and we think it clear that failure to make a separate return of excess-profits tax is none the less a failure to make the return contemplated by the statute because of the mere fact that the computations on the excess-profits return are to be carried onto Form 1040; the use of that form also is necessary to a complete report. By Section 213 the Commissioner was undoubtedly given authority, with the approval of the Secretary of the Treasury, to require both returns.

It is submitted that if it was proper in the *Beam case, supra,* to subject the taxpayer to the penalty for failure to make the return required by the statute and the Treasury regulations, by parity of reasoning the failure in the instant case to swear to the return as required by Section 239 of the Revenue Act of 1918, *supra,* and the Treasury Regulations thereunder should be held not to set in motion the limitation of Section 277 (a) (2) of the Revenue Act of 1924, *supra.*

The affidavit by respondent was not made until more than four years after a perfect and complete

return was due. On this point the language of the court in *Davis* v. *United States, supra*, is apposite. There, speaking of a claim for allowance of a drawback for internal taxes paid on exports, which claim was not filed in the proper form within the required time, it was said (17 C. Cls. 292, 301):

> When a government declares by law that certain specified acts must be done, in order to a citizen's becoming entitled to a gratuity out of the public Treasury, to which, aside from that law, he would have no right, every one of the acts must be done before he can claim the gratuity.
>
> And when a time is limited within which any of the acts shall be done, the very fact that it is limited is a declaration by the government of its materiality, and constitutes a condition precedent, which must be fulfilled before the right to the gratuity can be fixed. No claimant can say that it does not matter whether he did the act within the required time; for he has no standing as a claimant before the Commissioner unless it was done within that time; nor can any officer of the government, or any court, dispense with the requirement of time, unless express law so authorize; * * *.

As suggested by the Board below, all that the making of the subsequent affidavit indicates is that the Commissioner, in accordance with the Treasury regulations, had treated the return as imperfect and refused to accept it as meeting the requirements of the law.

Assuming that the affidavit is a "verification" of the kind required by the statute the taxpayer contends that it relates back to and makes complete the imperfect return as of time of its filing. This argument concedes that the return when filed was insufficient. If it did not then put in motion the statute of limitations, surely the affidavit could not both put it in motion and accelerate it. If the affidavit has any efficacy, it is to accomplish the filing of a complete return in September, 1923, which was less than five years prior to the deficiency assessment.

Article 407 of Treasury Regulations 45 (1919 ed.), *supra,* which was in effect at the time petitioner filed its unsigned and unsworn return, provided that "Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute." This regulation was ipso facto a rejection of an imperfect return. Though it is *received* it is not *accepted,* and hence it can not be deemed to have been filed.

Emmich v. *United States* (C. C. A. 6th), 298 Fed. 5, certiorari denied, 266 U. S. 608, is readily distinguishable. That was a case involving a criminal prosecution under Section 253 of the Revenue Act of 1921. A careful reading of the opinion makes it clear that the issue involved was whether the defendant was guilty of attempting to evade and defeat the tax. The counts charging perjury and failure to file a return were out of the case.

The question of whether there was a return was only collateral; and the court said that the return, whether sworn to or not, was intended to deceive and defraud the Government. A defendant would hardly be heard to excuse a violation of one law by pleading violation of another.

The Circuit Court of Appeals in the instant case, while recognizing the importance of the statutory requirement that a return shall be verified, held that the collector should have refused to receive the unsworn form and that, inasmuch as the absence of the verification was not noticed until four and one-half years after filing the return must be treated as the return required by statute. The effect of this holding is to make the Government liable for the negligence or laches of its officers contrary to the principle of law first announced by this Court in *United States* v. *Kirkpatrick*, 9 Wheat. 720. This rule has been often approved and was applied in *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, the Court saying (p. 409):

> As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is

> no defense to a suit by it to enforce a public right or protect a public interest.

See also *Ches. & Del. Canal Co.* v. *United States*, 250 U. S. 123, 125.

The question in the instant case is related in principle to the question of the sufficiency of a tentative return to start the running of the statute of limitations, which a number of the courts have had occasion to consider. The Circuit Court of Appeals for the Fifth Circuit, in *Florsheim Brothers Dry Goods Co., Ltd.* v. *United States*, 29 F. (2d) 895 (now before this Court on certiorari, No. 118), the Court of Claims in *Oak Worsted Mills* v. *United States*, decided December 2, 1929 (not yet reported), and the Board of Tax Appeals in *Appeal of Dallas Brass & Copper Co.*, 3 B. T. A. 856, *Appeal of Matteawan Manufacturing Co.*, 4 B. T. A. 953, *Appeal of Boston Hide & Leather Co.*, 5 B. T. A. 617, *Corona Coal & Coke Co.* v. *Commissioner*, 11 B. T. A. 240, and in this case, has held that the statute of limitations is not set in motion by the filing of a tentative return. The opposite view has been taken by the Circuit Court of Appeals for the First Circuit in *White* v. *Hood Rubber Co.*, 33 F. (2d) 739 (now before this Court on certiorari, No. 414), by the Circuit Court of Appeals for the Ninth Circuit in *Rasmussen* v. *Brownfield-Canty Carpet Co.*, 31 F. (2d) 89 (in which two judges refrained from expressing an opinion on the point), and by the District Court for the Eastern District of South

Carolina in *Brandon Corporation* v. *Jones*, 33 F. (2d) 969.

The statute of limitations begins to run only from the filing of a return or returns covering the entire taxable year. *Paso Robles Mercantile Co.* v. *Commissioner* (C. C. A. 9th), 33 F. (2d) 653 (certiorari denied, 280 U. S. 73A); *Willingham Loan & Trust Co.* v. *Commissioner* (C. C. A. 5th), decided November 22, 1929 (not yet reported).

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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JANUARY, 1930.

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Petitioner,

vs.

THE PHILIOD LUMBER COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The essential facts of the case are correctly stated in the petition for the writ.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported in 33 F. (2d), p. 245.

The sole question presented is whether the assessment of an additional income tax against the respondent for the year 1918 is barred by the statute of limitations, particularly Section 277 (a) (3) of the Revenue Act of 1926 (44 Stat. 58; U. S. C. 26:19:1068-111 (3)), re-enacting the provisions of Section 277 (a) (2) of the Revenue Act of 1924, which provides:

> "The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

The answer to the question depends solely upon whether the document filed by respondent on May 31, 1919, in the office of the Collector of Internal Revenue for the Tenth District of Ohio, was a "return" within the meaning of the statute such as would commence the running of the five-year limitation period.

The Circuit Court of Appeals held that the document filed was such a return, and that the assessment of the additional tax was barred.

ARGUMENT

I

The Decision of the Circuit Court of Appeals Does Not Present a Question of a Character Requiring, as a Matter of Sound Judicial Discretion, Review by This Court.

The decision of the Circuit Court of Appeals is not in conflict with the decisions of this court in the case of *Rock Island, etc., R. R. vs. United States,* 254 U. S. 141, and *Girard Trust Company vs. United States,* 270 U. S. 163, both cited in petitioner's brief.

A comparison of the language of the statutes construed in those cases with the statute here under consideration will show that those decisions are inapplicable to the present case.

In the *Rock Island* case the taxpayer sought to maintain an action to recover back a tax alleged to have been erroneously collected without having first made an appeal to the Commissioner of Internal Revenue for the refundment of the money, in the face of a statute which provided:

> "No suit shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, *until appeals shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard,* and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein," etc. (Rev. Stat. §3226.)

This court held that since the statute expressly required an appeal to the Commissioner for the refundment of the tax illegally collected, and no such appeal had been made by the plaintiff, the suit could not be maintained. It also held that a claim for the abatement of the tax made before its payment did not constitute an appeal for the refundment of the money, which must be made after payment.

In the *Girard Trust Company* case the taxpayer sought to recover interest on refunded taxes under authority of a statute providing:

> "That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of one per centum per month to the date of such allowance, as follows: (1) *if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest,* from the time when such tax was paid, * * *." (Sec. 1324 (a), Revenue Act of 1921, 42 Stat. at L. 316.)

No "specific protest setting forth in detail the basis of and reasons for such protest" had been made by the taxpayer, and this court therefore decided that the taxpayer was not entitled to the interest claimed under that section of the statute.

In both the above cases the statutes involved provided for the recovery of money by taxpayers conditioned upon their taking certain preliminary steps—in the one case filing an appeal, and in the other a specific protest—which were defined with particularity by the statutes. In both cases the taxpayers had taken certain

other preliminary steps which consisted of acts on their face different from what the statutes specified, and which did not even purport to be the acts specified by the statutes.

On the contrary, in the case under consideration the return filed by the respondent was intended and on its face purported to be exactly what was required by the statute prohibiting an assessment after five years from its filing. It was labelled "Corporation Income and Profits Tax Return for Calendar Year 1918, The Pilliod Lumber Co., Swanton, Ohio." (R., 10.)

II

Reasons Other Than Those Upon Which the Decision of the Circuit Court of Appeals Is Based Bring the Case Within Principles of Law Settled by This Court.

The affidavit executed by the officers of the respondent on September 17, 1923, (R., 10, 11) operated as an amendment and related back to and was effective, for the purpose of the limitation, as of the time of the filing of the return on May 31, 1919.

The affidavit referred to is a statement that the names of the appellant's officers should have appeared on the return, which, to the best of affiants' knowledge and belief, was correct. The contents of the affidavit are set out in full in the findings of fact of the Board (R., 11).

Claims filed in bankruptcy proceeedings, although insufficient in form and substance to fulfill the statutory requirements regarding proofs of claim, may be amended to correct their deficiencies even after the lapse of the